

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CUSTOM HAIR DESIGNS BY SANDY,) Case No. 8:17CV310
LLC, on behalf of themselves)
and all others similarly)
situated; and SKIP'S)
PRECISION WELDING, LLC, on)
behalf of themselves and all)
others similarly situated,)
Plaintiffs,)
vs.)
CENTRAL PAYMENT CO., LLC,)
Defendant.) Lincoln, Nebraska
February 26, 2019

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHERYL R. ZWART
UNITED STATES MAGISTRATE JUDGE

TRANSCRIBER: Ms. Lisa Grimminger, RDR, CRR, CRC
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A-P-P-E-A-R-A-N-C-E-S

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1 (At 12:01 p.m. on February 26, 2019; with counsel present
2 by telephone:)

3 MR. HARTMAN: Good afternoon.

4 THE COURT: Good afternoon. How are you?

5 MR. HARTMAN: Ken Hartman, Judge. How are you?

6 THE COURT: I am grand. And yourself?

7 MR. HARTMAN: Doing all right. The roads are getting
8 a little better to get downtown so that's good.

9 MR. CHALLY: Hi, everybody. This is Jon Chally from
10 King and Spalding.

11 THE COURT: Hello, Jon.

12 MR. HUDSON: Hello, Judge. How are you?

13 THE COURT: Good.

14 We are on the record in Case Number 8:17CV310. This is
15 Custom Hair Designs by Sandy, LLC, and others versus Central
16 Payment Company, LLC.

17 Counsel, please enter your appearance beginning with
18 counsel for the plaintiff.

19 MR. HUDSON: Tyler Hudson and Melody Dickson for the
20 plaintiffs.

21 MR. CHALLY: Your Honor, you have Jon Chally and
22 Brandon Keel from King and Spalding for the defendant, and as
23 you know, we also have Ken Hartman also representing Central
24 Payment.

25 THE COURT: Okay. And do we have any -- okay. So

1 Skip's Precision Welding, LLC, who represents them?

2 MR. HUDSON: Ty Hudson and Melody Dickson of Wagstaff
3 and Cartmell.

4 THE COURT: Okay. So you represent both plaintiffs?

5 MR. HUDSON: Yes, Your Honor.

6 THE COURT: Okay. I may have missed that when you
7 entered your appearance to begin with. All right. And
8 Mr. Hartman is not on; right?

9 MR. HARTMAN: I am here, Your Honor.

10 THE COURT: Oh. Hello, Mr. Hartman. How are you
11 today?

12 MR. HARTMAN: I'm doing all right, Judge.

13 THE COURT: Okay, all right. Now I'm getting my sea
14 legs back under me. Let's hear what this dispute is about.

15 MR. HUDSON: Thanks, Judge. This is again Ty Hudson
16 for the plaintiffs. We have served document requests and are
17 seeking the transactional data or fee data for the charges that
18 CPAY has imposed on merchants. So this case is a -- is a class
19 action in which the plaintiffs are merchants who are paying
20 fees to a merchant acquirer, a company that offers credit card
21 processing services; so they act as a middleman for -- to -- to
22 facilitate credit card transactions.

23 THE COURT: Okay.

24 MR. HUDSON: And so in this case what -- the case was
25 originally filed as a breach of contract case alleging that

1 there were particular fees that were being charged that were in
2 excess of the contract rates. So when merchants signed up with
3 Central Payment, or CPAY is what it sometimes referred to
4 itself as, they signed an agreement, a written agreement that
5 lays out certain fees that the -- that CPAY is going to charge
6 them, and our two plaintiffs are two merchants who had
7 particular fees that they were charged that were not agreed to
8 in the contract.

9 We then went forward in the class certification phase of
10 the case and obtained some discovery, and once we obtained that
11 discovery, we filed an amended complaint, and we've now added
12 claims under RICO, the federal racketeering statute, and
13 fraudulent concealment under Nebraska law. So the scope of the
14 case has expanded, and what we're asking for in the class
15 certification phase is the fee data going back to the inception
16 of the company. So it's our understanding that CPAY has kept
17 data going back to March of 2006. They've, for the most part,
18 produced all of the data from January of 2012 until the
19 present.

20 What we're asking for, Your Honor, is to go back to the
21 beginning of the company, and the reason that this information
22 is relevant is really twofold. One, in this class
23 certification phase, what we're trying to analyze is the scope
24 of the case. So for the RICO claims and the fraudulent
25 concealment claims, we're trying to figure out which -- what

1 fees were imposed on which merchants and then how did the
2 company operate.

3 One of the things that we've alleged -- and I'll give you
4 one example. There was a TSYS fee that was added, I believe,
5 in 2012 -- two -- 20 -- sorry, 2014. There was a fee, and one
6 of the -- one of our contentions is, is that that fee was --
7 was added not because CPAY had -- had any increased fees and
8 instead it was just a fee that was -- that was created to
9 extract excess profits from merchants. In other words, it
10 wasn't a pass-through where Visa or Mastercard or one of the
11 credit card companies had increased their costs on CPAY.
12 Instead it was CPAY just creating a way to make more money at
13 the expense of merchants.

14 And so one of the things -- the reason why the fee data is
15 relevant is because if we go back in time, we can see how this
16 company operated and what fees were they adding or not adding
17 at various points in time that will give us an insight into how
18 they operate as a company. In this case we're not -- we're not
19 necessarily saying that this is going to be data that's going
20 to be admissible at trial. That would be putting the cart
21 before the horse. All we're -- all we're saying is, is that
22 the data ought to be produced in the case so that we can see
23 the full scope of how the company operated. I think even if we
24 didn't have the new RICO and fraudulent concealment claims in
25 the case, it would still be relevant for that reason.

1 I think it becomes a really easy decision on relevance
2 when you have RICO and fraudulent concealment, because those
3 are fraud-based claims where the discovery rule applies, and so
4 potentially we need to see this data in order to determine the
5 scope of our class and how far the claims go back in time. So
6 that's -- those are the reasons why we believe that the
7 information is relevant to the claims currently in the case.

8 On -- and then, as to the second step, proportionality, in
9 this case really there's been no argument. We really actually
10 tried to limit the information that goes back prior to 2012,
11 and all we're asking for for the class certification phase is
12 the fee data, which if the company, you know, was -- was
13 operating in a legitimate or correct way, this should be data
14 that's just sitting on a database there, and it just with a few
15 keystrokes ought to be able to be exported out and produced in
16 this case. If it's more complicated than that, then that is --
17 in itself makes it relevant to the case, because it gives us
18 insight as to how the company was operating, and obviously,
19 with fraud claims in the case, we're trying to determine the --
20 how this company operated so...

21 And in terms of proportionality, while I know that the
22 defendant's submission said that it's not proportional to the
23 needs of the case, we've not -- they've not come forth with any
24 details on expense or time-consuming or anything else that
25 would cause it to be proportional. Again, we think this

1 strikes the right balance at the class certification phase of
2 allowing us to see the fee data, and that will give us insight
3 into what the company charged and how they operated for
4 purposes of making decisions on class certification, and it's
5 information that really goes right to the heart of the claims
6 in this case.

7 If you have any further questions, I'm happy to answer
8 them, but I think that's -- I think those are the -- the core
9 reasons why we think this information should be produced.

10 THE COURT: All right. Let's hear the response.

11 MR. CHALLY: Thank you, Your Honor. This is Jon
12 Chally on behalf of the defendant. Just one procedural
13 clarification. Mr. Hudson is correct that they have amended
14 the complaint to assert some additional allegations,
15 specifically RICO and fraud -- fraudulent concealment claims.
16 Mr. Hudson failed to point out, however, that we have a motion
17 to dismiss pending as to those claims. And while they are, I
18 suppose, in this case in the sense that they are in a pleading
19 that we have challenged as not sufficient to state the claim,
20 it is a far cry from them actually being in this case for
21 broader purposes, but I will say that that isn't alone the
22 reason why we have resisted this discovery.

23 We've resisted this discovery because despite what
24 Mr. Hudson is saying as to the scope of this case now, it's
25 completely inconsistent with what he has alleged to be the

1 scope of the case in the complaint. If this case relates to
2 the claims of two named plaintiffs who started interacting with
3 Central Payment no earlier than 2015, that alone is the scope
4 of this case for now. Until the class is certified, we're
5 focused on the named plaintiffs' claims; so that would justify
6 taking discovery back only to 2015.

7 Now, we have acknowledged that there is a class element to
8 this case, and we have agreed to provide information that is
9 important to evaluating class certification questions, but
10 we're not shooting in the dark as to the time period the
11 plaintiffs alleged for purposes of even the class. The
12 plaintiffs themselves said in both the original complaint and
13 in the amended complaint that the applicable time period for
14 the class is that which reflects the applicable statute of
15 limitations.

16 The longest statute of limitations that is at issue in any
17 of their claims, whether the new ones or the original breached
18 contract, is five years. And so what we have agreed to do is
19 produce to them data that shows all of this transaction level
20 data that they've asked for going all the way back to
21 January 1, 2012; so that covers every aspect of what they say
22 their class covers. It covers every aspect of what they say
23 their plaintiffs cover. It even covers the specific fee that
24 Mr. Hudson mentioned today, this fee that he says was created
25 in 2014.

1 If it was created in the way he's suggesting, the data
2 he's already got is going to show where that data came -- or
3 excuse me, where that fee came from and how it was applied from
4 that point going forward. So what they're really saying is
5 they're trying to amended the complaint and allege some basis
6 for tolling through a statement, a three-paragraph statement
7 seeking additional discovery, and we just don't think that's
8 proper, Your Honor.

9 If they think they have a basis for alleging that the
10 statute of limitations was tolled and the discovery rule
11 applies so as to extend their case beyond what they have
12 currently pled in their complaint, they have to allege it, and
13 they have to allege it in a way that -- that satisfies the
14 requirements of Rule 8 and in this instance would satisfy the
15 requirements of Rule 9(b), and they have to get past the motion
16 to dismiss those allegations, which we expect that we would
17 file if they were to attempt to do that, and they've done none
18 of that.

19 Instead they're just saying I want -- I want all of the
20 transaction level data that goes back to the beginning of this
21 company even though they haven't even tried to plead a case
22 that would justify implicating all the information. So what we
23 have said in resisting that discovery is, one, you have enough.
24 We have given you a significant amount of documents and
25 information in this case, and as to fee data, we have given you

1 everything we have been able to collect from January of 2012
2 to -- I believe it's 2000 -- October of 2018.

3 We've given them a significant amount of fee-related data,
4 and what we've said I think has been fairly transparent is that
5 isn't just a couple of keystrokes, that it is data. I want to
6 be clear about that. It is not a hard document that someone
7 has to go to an off-site storage to try to collect. It is
8 data, but it is a significant amount of data that requires, to
9 our understanding, multiple days. It's kind of an extraction
10 process.

11 So there is an expense, there is an effort that is
12 required to collect the additional data that they're seeking.
13 That is to be balanced against the value of that data in this
14 case, and the value of that data in this case is virtually
15 nothing, because they haven't even pled that they can pursue a
16 claim, whether on behalf of the plaintiffs or on behalf of the
17 class, that goes back as far as they're now suggesting.

18 So we think, to -- forgive me for using a term that I'm
19 sure you have heard all too often in the discovery context, but
20 we do think this is a fishing expedition. There is no basis --
21 there is no pled basis for seeking this information. If they
22 can allege a basis for it, they're free to do so. They're free
23 to seek to amend the complaint further and allege that basis,
24 and if that is sufficient to meet the rules requirements, then
25 we have a different story. But as of now we don't think

1 there's any basis to demand that we produce this additional
2 data.

3 THE COURT: Any rebuttal?

4 MR. HUDSON: Yes, Your Honor. Thanks. So I guess
5 two points. One is we're -- it's a discovery dispute, and
6 we're in the discovery phase of the case. We're trying to
7 figure out -- and in particular we're in the class
8 certification phase. We're trying to figure out what -- what
9 class can be certified, and how do we figure out whether or not
10 we can assert damages using common evidence? And one of the --
11 for -- and I'm just giving you an example. Even if this was
12 just a breach of contract case, for example, one of our
13 allegations is, is that they've increased the fees over time
14 beyond the contractual rates.

15 Well, how do you figure out whether or not the fees got
16 increased? You've got to look at the baseline. And so in this
17 case the way that this company keeps their data is by
18 merchants, you know, month by month by month, and so over time
19 they're billing these merchants every month. I mean, in order
20 to be able to go back and look at the data just -- just on the
21 breach of contract claim, this data would be highly relevant
22 just to look at the history of the fees that were being charged
23 for each merchant for -- for purposes of trying to figure out
24 when these increases were occurring, how they were occurring.

25 So just in that world, if we were just operating in that

1 world, this would be highly relevant data that would not
2 involve a fishing expedition but instead would be, again,
3 focused completely on trying to get our arms around how the
4 company increased fees over time or added fees over time. So
5 even if -- even if they -- even if their argument were right on
6 the statute of limitations, right on the scope of the case, and
7 we were talking about just a breach of contract case going back
8 five years to 2012, I would say that this would be highly
9 relevant information again for just trying to figure out
10 damages methodologies, because we're limiting it just to the
11 data itself.

12 We're not asking for any, you know, work product beyond
13 that. We're not asking for emails, we're not asking for -- for
14 anything else, just the data itself that should be housed in
15 databases within the company. But moreover, you know, the case
16 has changed and it is expanded, and there is a fraud claim
17 and -- a fraudulent containment claim and there's a RICO claim
18 and those -- there -- we don't have to establish tolling.

19 The discovery rule applies, and that's what we made clear
20 in the complaint is, is that the case is as broad as the
21 applicable statute of limitations. And so what -- what -- what
22 I hear opposing counsel saying is that because we've only got
23 two plaintiffs and their claims relate to 2015, then we don't
24 get any discovery broader than that and we don't get any
25 discovery on anything going back further in time on our fraud

1 claim or our RICO claim, especially again for purposes of class
2 certification. That doesn't make any sense.

3 We've got to be able to figure out and see the evidence in
4 order to define the scope of the case and figure out what's
5 going on. So I think that makes this an even -- an easier --
6 an even easier decision because of the inclusion of those
7 claims in the case. That's -- we disagree that the longest
8 statute of limitations goes back five years. It comes -- it
9 involves when the fraud was discovered. And in the first
10 instance what we've got to analyze for purposes of figuring out
11 what our class is, is what fees did they charge going back in
12 time? And if we don't have that, then we can't make any of
13 those assessments and determinations.

14 And that brings us to the proportionality point, and
15 that's the point is we've tried to make this very proportional
16 by zeroing in on the -- the absolute core information that we
17 would need in the class certification phase to make this
18 decision, and that's the data itself. I mean, that's the --
19 that should be the least intrusive, the easiest to collect, and
20 the most insightful for the scope of this case and allow us and
21 our experts to analyze the information, to make informed
22 decisions on how to define the class and how to explain who the
23 class members are and what the common evidence is that exists
24 for purposes of class certification, and without the data we're
25 not going to be able to do that, and it would handicap our

1 ability to do it.

2 We've -- we've kept it -- kept it narrow at this point in
3 time, and so I think this -- in this situation in class
4 certification, the data is the right balance, and we should be
5 entitled to -- to receive it and review it.

6 THE COURT: All right. I don't hear that the
7 defendants are saying that the data isn't the right thing to
8 ask for. I hear what they're saying is the scope is
9 inappropriate because it goes all the way back to the inception
10 of the company, and they believe that giving you the data from
11 January 1st of 2012 through when they responded to it, which
12 was late in 2018 -- I didn't write down the exact date, but
13 that that is the data that you need. So on that grounds I'm --
14 I'm not buying your argument that they're somehow objecting to
15 giving you data. They're just objecting to the time frame.

16 Am I right on the defendant's side?

17 MR. CHALLY: Yes, Your Honor, you're exactly right.
18 I would add just very briefly that we're not fighting over
19 data. That data has been produced. We are fighting over the
20 time period, as you suggested. I would say that Mr. Hudson's
21 suggestion that the data is somehow the key to understanding
22 the claim is a misapprehension of this case. This case is
23 the -- the merchants, the members of the class, agreed to a
24 contract that Mr. Hudson believes based in certain fees, and
25 then Mr. Hudson contends that the defendant has charged certain

1 different fees over time.

2 THE COURT: Uh-huh.

3 MR. CHALLY: Well, putting aside the fact that the
4 merchants, the plaintiffs here, actually saw those fees as they
5 were charged over time, the -- the two relevant data points
6 there are the initial agreement and then the transactions level
7 data that they can assert a claim on considering the applicable
8 statute of limitations. You do not get to review transaction
9 level data from prior to the scope of the statute of
10 limitations just to sort of see whether it's consistent with
11 what you had previously agreed to.

12 The claim here is application says certain fees, and then
13 from whatever time the law allows the plaintiffs to assert the
14 claim, were those fees consistent with what the plaintiff
15 believes it agreed to? So you don't need the transaction level
16 data to address the question Mr. Hudson is focused on. But to
17 address your specific question, we aren't disputing whether or
18 not fee data can be discovered here. It can be. It has been.
19 We're talking about whether we need to produce an additional
20 seven years' worth of data.

21 THE COURT: Okay. I'm looking at the amended
22 complaint, and it's filing number 49, and it is correct it is
23 subject to a motion to dismiss at this point in time. Since it
24 is subject to a motion to dismiss, while it is out there as the
25 pleading, it is not necessarily the operative pleading right

1 now, because it may well be that Judge Bataillon finds that
2 there is no claim for RICO. It is very difficult to allege a
3 civil RICO claim. It may also be that he finds there is no
4 claim for fraud.

5 And more importantly, as to the class issue, looking at
6 the class allegation, which is in paragraph 212, which is on
7 page 53, it's "All customers in the United States that paid a
8 fee to Defendant that is higher than those set forth in the
9 Merchant Processing Application & Agreement." It seems like
10 the data points as defendant argues are: What does the
11 agreement permit, and what did you charge?

12 And going back, if it -- if this is a fraud case or a RICO
13 case, even if we would to -- were to do that, I believe the
14 statute of limitations would be four years. Going back on a
15 contract claim, it would be five years, and going back five
16 years before the case was filed would be August 17th of 2012.
17 They're giving you data for the seven months even before that,
18 and it strikes me that you can compare that data to the
19 Merchant Processing Application & Agreement that is at issue
20 and decide where -- whether anything has been overly charged or
21 charges have been imposed that were not part of that agreement.

22 I'm not understanding why it makes a difference if
23 somebody prior to August 17th of 2012 had a better agreement,
24 had a different agreement, or that the company changed its
25 agreement over time.

1 I'm not understanding that argument by the plaintiff so
2 I'll give you one more crack at it, but for right now you've
3 got to explain that to me before I'm going to grant your
4 motion.

5 MR. HUDSON: Thanks, Judge. I appreciate that.
6 Yeah. I think, well, a couple things. One, in terms of the
7 scope of the case, I guess it's extremely important to us to
8 understand where we are and what -- what -- what claims are in
9 the case or not in the case for purposes of class
10 certification, because we've got deadlines coming up in a
11 couple months, and our assumption was -- was that because we
12 filed claims that include -- you know, in other words, we filed
13 a complaint, an amended complaint that includes claims for
14 RICO, fraudulent concealment, breach of contract.

15 So we're under the assumption that we're moving forward
16 and need to, in about two months, create expert reports; and
17 then I believe it's in April, April 4th, file a class
18 certification motion that would include certifying classes on
19 all three points. So that's -- that's kind of -- I guess is --
20 is an aside, but I think it's important on those claims.

21 I think in terms of your -- you're absolutely right, Your
22 Honor. The dispute is not about whether or not we get the
23 data. It's the scope of how much data we get. And Mr. Chally
24 explained it as we need to just look at the initial agreements,
25 and then we need to look at the transactional level data during

1 the pertinent time period for when the breach of contract --
2 you know, the breach of contract statute of limitations would
3 exist. Even that, though, Judge, we don't have the initial
4 agreements. They haven't produced all of the initial
5 agreements for the merchants in the class. There's like 40,000
6 merchants in this class, and that's why --

7 THE COURT: Well, pause, pause. Are you -- you have
8 your own clients' agreements; right?

9 MR. HUDSON: Yes, we do.

10 THE COURT: Are you saying that the 40,000 merchants
11 that you purport to represent may all have different contracts?
12 And how -- if that is true, how in the world could this ever be
13 a class?

14 MR. HUDSON: Well, Your Honor, that's why -- that's
15 what -- that's why we're trying to take discovery during the
16 class certification phase to try to figure out these issues.

17 No, we would say no, we don't believe that the -- that the
18 merchants all have different contracts with different terms.
19 We think what's critically important is to look at the
20 transactional data, and this is why the most efficient way to
21 analyze this issue is to look at the data, because each time a
22 merchant signs an agreement, the company has policies and
23 procedures, and the practice of what they're supposed to do is
24 then go and input that information on the fees that are to be
25 then charged on a merchant-by-merchant basis into a database,

1 and that's what we're asking for is, is if they will produce
2 the data going back in time.

3 I mean, for example, if a merchant joined the company in
4 March of 2006 at its inception and went forward in time, if
5 they will produce the data, then we'll be able to see here's
6 the baseline which is where this customer then was inserted
7 into their database. And then for purposes of analyzing their
8 damages, then you can take that baseline and look and see where
9 there were increases that are inconsistent with the contract.
10 But that's why -- that's why it's our contention that the core
11 of this dispute, even if we're talking about just a breach of
12 contract case, is the data itself's not the critical component.
13 It's we've got to be able to see a baseline.

14 And that's, Your Honor -- I mean, that's the issue is
15 our -- our experts can -- can testify or, you know, issue
16 reports on what they see from our two class representatives
17 from the way that their agreements are set up and the data and
18 the information, but to say -- but to say anything larger about
19 the class and make statements about the class, we've got to see
20 how the company kept the data and be able to go and analyze
21 that, because that's what we need.

22 To get the class certified, as you know, Your Honor, is
23 we've got to be able to point to common evidence to support our
24 claims, and so that's why this data provides us what we need
25 and gives our experts the foundation to go and analyze those

1 issues and determine the scope of the case and -- and what's
2 pertinent to the claims.

3 And I think -- you know, and I know I -- I'm hearing loud
4 and clear what you're saying about RICO claims and fraudulent
5 concealment, but, I mean, on those two claims in particular,
6 the discovery rule would apply, and so I think those would
7 definitely expand the scope of the case, and if we're expected
8 to go and file class certification motions and attempt to
9 certify those claims on a classwide basis at the April 4th
10 deadline -- I'm sorry. If our experts are supposed to be
11 drafting reports that are providing the foundation and that's
12 all to be done by April 4th, we need the data in order to go
13 and do that and go forward with that so --

14 THE COURT: I'm not --

15 MR. HUDSON: And --

16 THE COURT: I'm not understanding that. It seems to
17 me that your class is going to be limited to the people whose
18 claims aren't barred by the statute of limitations. As of
19 right now you've got more data than -- than is included within
20 the statute of limitations. You've got a contract for each of
21 the people you hope to represent, and if you don't have that
22 contract, then -- then that's a whole different thing, but
23 that's not what you're asking for today. You're asking for
24 today all of the data to see how your -- the clients that you
25 currently represent, which are the only -- only the two named

1 plaintiffs, you're asking for all of the data for everybody
2 they've ever done anything for since the inception of the
3 company, and I don't -- I don't see how anything that is beyond
4 the statute of limitations is relevant. Even as to figuring
5 out who's going to be in the class and whether the people that
6 are in the class were somehow overcharged, I -- I don't see it
7 so --

8 MR. HUDSON: Judge, how do we establish the baseline,
9 then? For example, even if we were restricted to a breach of
10 contract claim, how do we establish the baseline to figure out
11 whether or not the other class members were overcharged
12 compared to -- to what was initially agreed to in the
13 agreement?

14 I mean, in other words, if you're saying for purposes of
15 class certification we can take our two named plaintiffs, look
16 at their representative examples, and then say we can do the
17 same thing and make the same analysis on the merits for the
18 entire class and not going to be --

19 THE COURT: I'm saying -- I'm saying this is all
20 governed by a contract. Look and see whether they were charged
21 more than they were supposed to under the contract and -- and
22 that doesn't -- we're not looking at company trends. We're
23 looking at a contract. And I don't understand why you need to
24 see what they charged in 2006 to know whether they violated a
25 contract in 2012. I don't get that.

1 MR. HUDSON: Well, for one reason, because one of the
2 allegations is, is that they were making increases in rates
3 over time, systematically increasing the rates, and so when you
4 look at the fee data going back in time, you -- you can see the
5 baseline. I mean, in other words, is the expert -- our
6 experts -- and again, maybe I'm misunderstanding in the
7 District of Nebraska the scope of what we need to do for
8 purposes of filing class certification motions but --

9 THE COURT: Well, we follow the Federal Rules like
10 everybody else does so I mean -- so you're not
11 misunderstanding. I -- what I'm saying is you can't -- I don't
12 understand, given that if your claim is and your class is that
13 the customers were charged -- that they paid a fee to defendant
14 that is higher than those set forth in the Merchant Processing
15 Application & Agreement, which is how you define the class in
16 paragraph 212 on page 53 of the current amended complaint, I
17 don't understand how you need a baseline of what was charged in
18 2006 to know whether they were charged beyond what the
19 agreement allowed them to be charged in 2012.

20 MR. HUDSON: And, Your Honor, that may be my fault.
21 I apologize. I probably am not explaining well. What I'm
22 trying to get at is the -- the data -- what I mean by the
23 baseline is the initial input into the computer will be the
24 contractual rate. In other words, under their policies and
25 procedures, they will be inputting into their database the

1 contract rate initially so -- so instead of having to go and
2 look through 40,000 different agreements and determine what the
3 information is, the transactional data itself that first month
4 that it gets input -- you know, CPAY has policies and
5 procedures that says, you know, step one, the company goes and
6 reaches a written agreement with a merchant.

7 Then step two is then you take that information, and
8 there's an uploading process into their database. So it's --
9 it's -- that initial data should be what is consistent with the
10 contract, and what we're saying is then over time -- so that's
11 month one. This baseline gets set in their database which
12 is -- which should be consistent with what's in the contract,
13 but then what we see over time is that there are increases in
14 those fees that are inconsistent with what's -- what's in the
15 contract, and you can see that in the fee data.

16 So -- so if we're talking about just our contract claim,
17 which I agree, Your Honor, it's a closer call for the contract
18 claim than it would be for the RICO claim or the fraudulent
19 concealment claim, but I think the reason why it's relevant is
20 because the data itself allows you to see -- that first month
21 allows you to see what should be the contractual rate in that
22 database.

23 MR. CHALLY: Your Honor, if I can just very briefly
24 address that final point.

25 THE COURT: Sure, uh-huh.

1 MR. CHALLY: Thank you. Two issues with respect to
2 that. The first is Mr. Hudson is suggesting and is reading
3 policies and procedures that as -- as you -- we would all
4 imagine require some sort of a data entry analyst to include in
5 the system the contractually agreed fees and charges. That's
6 true, but he's reading that to assume that that entry is
7 archived and maintained for an extended period of time. And
8 while we are checking on that, I am not currently aware that
9 that is accessible, that the initial entry is actually
10 archived.

11 But it really doesn't matter whether it is or not, because
12 if it is, that's information that we would expect we would be
13 able to collect and produce. We're not fighting over whether
14 we would produce even that information. What we are fighting
15 over is whether that information has to go back to 2005.

16 So if Mr. Hudson's theory on how this data is archived is
17 correct and consistent with what we understand and that it is
18 accessible in a way similar to the rest of the fee data is
19 accessible, something that we don't know just yet, if it is,
20 they will have it for the time period that is applicable based
21 on the plaintiffs' claims, the plaintiffs' individual claims,
22 and the class that's pled in the complaint. So that does not
23 answer -- it doesn't even begin to answer the question of
24 whether we should be producing this additional seven years'
25 worth of data.

1 THE COURT: I think what he's saying is he needs that
2 additional seven years' worth of data to figure out what the
3 contract was at the outset. Can you address that on the
4 defendant's side?

5 MR. CHALLY: Yeah. We certainly do believe, Your
6 Honor, that the best evidence in that contract is the contract
7 itself.

8 THE COURT: Right.

9 MR. CHALLY: And that is exactly what the defendant
10 should be after and what the plaintiffs should be after, that
11 rather than what a data analyst input, the best evidence of the
12 contract is the contract, and so we would need to be looking at
13 the contract itself. I think that that -- that cannot -- no
14 other proxy for it. Whether you're talking about what a data
15 entry analyst said or what one of the plaintiffs orally
16 articulated to someone else as the appropriate numbers that
17 they agreed to, neither of those things can change the terms of
18 the contract.

19 The contract is what it is, and you have to look at the
20 contract to evaluate what the contract obligated CPAY to do
21 with respect to -- to the plaintiffs. So I don't think that
22 any other evidence, assuming it exists -- and that's a big
23 assumption at this point -- I don't think any other evidence
24 can substitute for the terms of the contract itself.

25 THE COURT: Okay. And are you saying on the

1 defendant's side that you're looking for those contracts that
2 they're -- that -- have they been asked for?

3 MR. CHALLY: We have produced what the plaintiffs
4 have asked for in terms of the contracts.

5 THE COURT: Okay.

6 MR. CHALLY: As I sit here today, I don't recall
7 whether they had a sweeping request for every contract of every
8 merchant from the -- from the time period applicable in this
9 case, but we have produced every contract that has been asked
10 for.

11 THE COURT: All right. Under the circumstances as
12 discussed, I'm inclined to agree with the defendants *[sic]* on
13 this. I don't believe that going beyond what they've already
14 provided you is relevant in this situation, and it is
15 disproportionate, because by the time they go all the way back
16 into 2006 and into all of these archives and such, there may
17 well be -- they may well be providing you with information
18 that -- for clients that don't even exist anymore so...

19 So that's my ruling. I'll upload the audio on this. You
20 can appeal from it if you wish to by citing to the audio
21 itself.

22 Anything else that we need to take up at this time?

23 MR. HUDSON: Yes, Judge. This is Ty Hudson again for
24 the plaintiffs. We would like to get just some guidance from
25 you, I guess, in terms of our schedules. And it is my

1 understanding -- and again, I may be under a misapprehension,
2 but that we're in the class certification phase and that we
3 would be expected to be -- to be filing or serving expert
4 reports and then filing a class certification brief in a few
5 months relating to all three claims in the case.

6 Also, in connection with that, I guess what we were
7 looking for is just we were -- we were going to take the
8 depositions of a class representative and then also maybe one
9 or two fact witness depositions, and I was just concerned --
10 different districts do it different ways -- in terms of our
11 ability to take the deposition of the same witness more than
12 one time.

13 So I guess just in terms of the scope of the case, we were
14 hoping to get some guidance on that to make sure that we were
15 doing things as efficiently as possible and consistent with the
16 Court's expectations.

17 THE COURT: Well, whether a class is certified or
18 not, you have a plaintiff; right?

19 MR. HUDSON: Yes.

20 THE COURT: So why would we limit the plaintiffs'
21 depositions to just class certification questions when, with or
22 without a class, the plaintiff is or is not going to go
23 forward?

24 MR. HUDSON: Yeah. That's a great point, and I don't
25 think we've been on our side suggesting that we would limit the

1 depositions of our plaintiffs. I guess I was more focused on
2 taking the depositions of the defendants [sic], you know, in
3 other words, their class representative and then a couple of
4 their key fact witnesses who are involved in running the
5 company.

6 THE COURT: I don't know if the defendants [sic] have
7 class representatives.

8 MR. CHALLY: Yes, Your Honor. It might be helpful if
9 I explained this just a little bit.

10 THE COURT: Okay.

11 MR. CHALLY: I think Mr. Hudson is referring to
12 corporate representatives --

13 THE COURT: Oh, okay.

14 MR. CHALLY: -- and in that context we certainly do.
15 This issue arose because the plaintiffs issued a 30(b)(6)
16 notice that sought corporate representative testimony of our
17 client, and the notice itself was, you know, as you would
18 expect in an instance -- in a case like this, fairly broad and
19 covered topics that we thought were related to both call them
20 class issues and merits issues.

21 And to properly respond to that, we identified a witness
22 who the document production that has been conducted in this
23 case reveals to be -- reveals to have knowledge that sort of
24 spanned the wide aspect of the claims here, and so we indicated
25 to plaintiffs' counsel that we are happy to present this

1 particular individual as a corporate representative, we would
2 request that you, you know, make an effort to take his
3 deposition in that capacity, but also in the -- in his capacity
4 as a fact witness individually based on his personal knowledge,
5 and that we try to consolidate that so that we only take his
6 deposition one time.

7 And -- and the -- what we heard in response -- and
8 Mr. Hudson can certainly address this, but what we heard in
9 response was we believe that the case is now narrowly focused
10 on class certification issues; so what we intend to do is ask
11 only those questions of this witness that are applicable to our
12 motion for class certification and then reserve the ability to
13 come back to this witness after the resolution of the motion
14 for class certification and take his deposition again.

15 THE COURT: Yeah.

16 MR. CHALLY: And -- and --

17 THE COURT: That --

18 MR. CHALLY: -- we indicated that that was -- we
19 objected to that, and so I believe that's the clarity he is
20 driving at.

21 THE COURT: Yeah. And that may be how they do it in
22 different districts, but in our district what -- you take the
23 deposition of a person once you're going to use them. You take
24 it on all issues that you can at one time. Obviously, a person
25 who is sitting as a 30(b)(6) representative is, for all

1 practical purposes, the company at that point in time, which is
2 different than being an individual. That's up to the parties
3 as to whether they want the -- that witness to sit once or
4 twice, because they are truly testifying in two separate
5 capacities.

6 But as I said before, I think the same principle applies.
7 There are two plaintiffs in this case whether a class is
8 certified or not, and as to the discovery as to those two
9 plaintiffs, let's get it done along with whatever you need to
10 get done to determine whether you're going to request class
11 certification.

12 All right? Does that answer your question?

13 MR. HUDSON: Yeah. I mean, that -- that is helpful.
14 I mean, I guess, for purposes of class certification, are we --
15 are we -- we have a first amended complaint that includes
16 claims for breach of contract, RICO, and fraudulent
17 concealment. Judge Bataillon hasn't ruled on the motion to
18 dismiss the RICO or fraudulent concealment claims, and so, I
19 mean, my assumption was we would go ahead and move forward with
20 class certification on all three claims pending the outcome of
21 his decision.

22 Should we -- should we think about, you know, extending
23 the schedule to wait for him to rule before we file class
24 certification briefing?

25 THE COURT: Well, what is the difference in the scope

1 of your questioning?

2 MR. HUDSON: That gets back to what we were talking
3 about earlier today. I mean, in terms of -- a RICO claim and
4 fraudulent concealment are -- are pretty different than a
5 breach of contract in terms of just -- you know, I mean, in
6 other words, RICO would involve a scheme to defraud that
7 involves an enterprise and just, you know, a significantly
8 different level of analysis in terms of -- of how you would --
9 how you would walk through the common evidence to prove each
10 one of the elements of those claims.

11 THE COURT: Okay. So just a minute.

12 I'm checking progression schedules here so hang on. I'm
13 still with you. I'm just checking.

14 You amend them so many times on these kind of cases that
15 after a while it's hard to find our own orders.

16 MR. HUDSON: Yeah. It's docket number 58, Judge, on
17 December 26th.

18 THE COURT: Well, that's the current one. What was
19 the original one? 'Cause we have an amended one, and I'm not
20 seeing the original one so...hold on a second.

21 MR. CHALLY: Your Honor, I was looking for that. I
22 think it may actually be reflected in our planning report. Let
23 me -- let me pull it up.

24 THE COURT: Okay. So maybe we didn't put out one
25 that had...

1 MR. CHALLY: Yeah. It is in the original planning
2 report, which is docket number 19.

3 THE COURT: Got it.

4 Well, you know, I don't like moving all of these deadlines
5 down the road. I'm going to ask a real simple question. Why
6 did you wait so long to try to add RICO claims and concealment
7 claims in this case?

8 MR. HUDSON: Because we didn't get the documents. It
9 took a long time to get documents produced, and then we
10 reviewed them, and then we found the evidence, and then as soon
11 as we found the evidence, we went and filed an amended
12 complaint that added, you know, 20 pages of factual allegations
13 relating to what we found, because obviously fraud requires
14 intent and planning and things, and so we didn't have the
15 evidence to originally allege that, but once we found it in
16 discovery, we quickly amended.

17 THE COURT: Okay, all right. So we've got -- on the
18 motion to dismiss, that was fully submitted, if you go with the
19 reply, January 30th. And then there's a motion to strike
20 improper evidence, and there's a response to that.

21 So even at the outside, it's fully submitted as of
22 February 11th. So we'd be looking at, crossing our fingers,
23 for April 11th time frame of getting a ruling on the RICO issue
24 and the fraudulent concealment claims. What is our current --
25 okay. Going back to number 58.

1 If I move those deadlines for the expert reports and the
2 disclosures and the deposition dead- -- well, the deposition
3 deadline isn't until June 10th. You should have a ruling by
4 then. I don't know that there's a reason to move that deadline
5 for sure. You might want me to move the deadline for
6 identifying expert witnesses and for expert witness
7 disclosures, because the expert witness disclosures are
8 April 4th and May 5th, but what deadlines is the plaintiff
9 proposing that I move while you await a ruling on the RICO and
10 the fraud claims?

11 MR. HUDSON: Those rulings. What you just said, the
12 experts. The expert reports and the class certification
13 briefs.

14 THE COURT: Okay. What is the defendant's response
15 to that?

16 MR. CHALLY: Your Honor, we -- I don't have any issue
17 with the -- with moving the deadlines for identifying experts
18 and providing expert disclosures or reports. I do have some
19 concern over moving the briefing deadlines for class
20 certification. And I want to be clear that while we -- we do
21 have a dispute over the time period for the fee data that you
22 have addressed and resolved, we are not refusing to produce
23 documents or refusing to present witnesses to address those
24 contentions that go to the RICO or fraud-based claims; so it's
25 unclear to us how this current schedule is tying the

1 plaintiffs' hands behind their back.

2 I take your point that they may want to know, and as do
3 we, whether these claims are actually in the case or dismissed
4 before they file a motion for class certification, but they're
5 likely to have that, seeing as how their deadline is June 15th.
6 If they'd like some additional time to make sure their experts
7 are addressing those claims, I don't have an objection to that.
8 I would think that they can do that, meaning their experts can
9 address these aspects of these claims now with the document
10 data that they have and don't see a need for a further delay.

11 Just to be honest, Your Honor, we just think this case
12 kind of needs to move forward and that the motion for class
13 certification should -- the deadlines for the briefing on the
14 motion for class certifications should remain as they are.

15 THE COURT: Okay. So the questions on a class
16 certification are commonality, typicality, numerosity, and
17 adequacy of representation.

18 Why do you need to know whether the fraud claims and the
19 RICO claims are going to go forward to determine those four
20 elements of class certification?

21 MR. HUDSON: Well, Judge, it impacts the scope of the
22 case. I mean, for example, Mr. Chally, his primary argument
23 earlier today on this call was that the RICO claims and the
24 fraudulent concealment claims aren't in the case, and so all we
25 need to do to figure out whether or not we can get the class

1 certified is compare the initial agreement to the transaction
2 level data, and so now it feels like he's now -- he's now
3 saying we don't want to -- we don't want to wait on class
4 certification. Everything moves forward.

5 We're fine with that, but then I think we're entitled to
6 this transaction level data to be able to analyze what this
7 company did over time, because the RICO claim and the
8 fraudulent concealment claims, what we're saying is, you know,
9 if you read the complaint, we included a lot of details related
10 to emails and other evidence that strongly suggests that this
11 company was going and adding fees, increasing fees, and -- and
12 scheming to extract excess profits from these merchants.

13 And so this fee data, for example, is really lying at the
14 heart of what we're going to need for the -- so -- so, for
15 example, commonality, and I guess I would also point to under a
16 (b)(3) class, which is what we'd be moving for, really
17 predominance is where the fight often is between the plaintiffs
18 and defendants, and so are these individualized issues, or can
19 we use classwide data to prove our claims?

20 At the core of that is being able to look at the company's
21 transaction level data and what we argued about earlier and be
22 able to say, look, Judge, here's the data that they have, and
23 go and let our experts analyze that data and be able to say,
24 yes, we can use the company's own data, analyze it over time,
25 and be able to show that they were extracting profits and

1 adding fees and increasing fees inappropriately and contrary to
2 what was agreed to.

3 And I'd be happy to brief that or show you other cases --

4 THE COURT: No.

5 MR. HUDSON: -- or whatever we need to do to show you
6 that --

7 THE COURT: I am still -- I am still convinced that
8 the -- that the issue isn't -- but it really comes down to it
9 isn't the trends in how they were charging fees. It's what did
10 they -- did they charge something they didn't agree to? I
11 mean, I'm -- and it seems like the agreements are going to
12 govern whether people were overcharged, and if you agreed to
13 pay an exorbitant fee, I don't know what the Court is supposed
14 to do about that.

15 And I suppose that gets into your thing about, well, was
16 there some sort of concealment about how this was going to be
17 applied or whatever and so I -- I'm not going to go there, and
18 I'm not getting -- and just to be -- just kind of gives you
19 sort of a little taste of this, if -- and this is repeating
20 what I said before, but if all of these merchants have these
21 different agreements and they're all, you know, arm's length
22 agreements that they negotiated at some point in time, or if
23 there were certain types of agreements that were given to
24 certain types of merchants that had certain types of things, or
25 if some agreements were -- were the 2010 version and others

1 received the 2012 version because that's when they first came
2 on board, all of that is going to be something I care about
3 when I look at the motion for class certification, because then
4 you start looking at the commonality and typicality issues, and
5 it'll all come back to whether or not this -- these -- well,
6 first of all, whether there is commonality and typicality, and
7 secondly, whether the named plaintiffs can represent all or a
8 portion of this global class or U.S. class that you're trying
9 to represent. So just kind of keep that in mind as you go
10 forward.

11 But in light of your request for additional time, I'm
12 going to give you some additional time. I'm going to give you
13 till May 15th to disclose the reports from your experts. I'm
14 taking out the identification deadline. We're just going to go
15 with reports are due by May 15th, June 15th from the defendant,
16 and the class certification motion needs to be filed by
17 July 30th with the briefing schedule under the rules, and the
18 deposition deadline will be on July 15th, and I'll put that out
19 in an order.

20 Anything else I can take up for you today?

21 MR. CHALLY: Your Honor, I apologize for not knowing
22 this off the top of my head, but I would ask that our response
23 to the motion for class certification be due 30 days after the
24 plaintiffs file their motion like the current --

25 THE COURT: Okay.

1 MR. CHALLY: -- progression schedule.

2 THE COURT: Okay.

3 MR. CHALLY: I believe that's a minor modification
4 from the local rules.

5 THE COURT: Yeah, that is a modification so...
6 Okay. We'll go with August 30th.

7 MR. HUDSON: And then, Your Honor, if we could get 15
8 days in reply too.

9 THE COURT: Yeah.

10 MR. HUDSON: Great.

11 THE COURT: Okay. So we'll put out an order
12 consistent with that. Is there anything else we can take up?

13 MR. HUDSON: Not from the plaintiffs, Your Honor.

14 MR. CHALLY: Nor from the defendant. Thank you very
15 much.

16 THE COURT: All right. Have a great day, and arise,
17 go forth, and litigate.

18 MR. CHALLY: Thank you.

19 THE COURT: Bye.

20 (1 p.m.-- Adjourned.)

21 * * * * *

22 I, Lisa G. Grimminger, certify that the foregoing is a
23 correct transcription to the best of my ability from the
24 digital recording of the proceedings held in the above-entitled
25 matter.

25 /s/Lisa G. Grimminger

Lisa G. Grimminger, RDR, CRR, CRC Date